REPORT

of the Committee on Legal Affairs and Citizens' Rights

on the Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights

(COM(92) 33 final - SYN 395 - C3-0189/92)

Rapporteur: Mr Carlos María BRU PURON
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By letter of 24 April 1992 the Council consulted the European Parliament, pursuant to Articles 57(2), 66, 100a and 113 of the EEC Treaty, on the Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights.

At the sitting of 11 May 1992, the President of Parliament announced that he had referred this proposal to the Committee on Legal Affairs and Citizens' Rights as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media for their opinions.

At its meeting of 20 February 1992 the Committee on Legal Affairs and Citizens' Rights had appointed Mr Bru Purón rapporteur.

At the meetings of 26 May 1992, 23 September 1992 and 4 November 1992 the committee considered the Commission proposal and the draft report.

At the last of these meetings it adopted the draft legislative resolution by 16 to 0, with 1 abstention.

The following were present for the vote: Vayssade, acting chairman; Rothley, vice-chairman; Bru Purón, rapporteur; Alber, Anastassopoulos, Bontempi, Defraigne, Fontaine, García Amigo, Grund, Hervé (for Medina Ortega), Hoon, Janssen van Raay, Oddy, Perreau de Pinninck Domenech (pursuant to Rule 124(4) of the Rules of Procedure), Salema O. Martins, Schwartzenberg (for Cot), Simpson and Ukeiwé.

The opinions of the Committee on Economic and Monetary Affairs and Industrial Policy and the Committee on Culture, Youth, Education and the Media are attached.

The report was tabled on 5 November 1992.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.
Commission proposal for a Council directive harmonizing the term of protection of copyright and certain related rights

**Commission text**

1. **Amendments**

(Amendment No. 1)
Recital 2a (new)

Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which the term of protection is calculated; whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or televisual work:

(Amendment No. 2)
Twentieth recital

Whereas rightholders should be able to enjoy the longer terms of protection introduced by this Directive equally throughout the Community provided their rights have not yet expired on 31 December 1994.

(Amendment No. 3)
Article 1(2)a (new)

Whereas, for the smooth functioning of the single market, this directive must be applied immediately it enters into force, while ensuring that rights legitimately acquired by third parties are safeguarded.

The author(s) of an audiovisual works shall be the natural person(s) responsible for the creation of the work. In the absence of evidence to the contrary, the following shall be presumed to be the authors: the director, script writer, dialogue writer, adaptor and the composer of music with or without words which has been specially written for that work.

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1 For full text, see COM(92) 33 final - SYN 395, OJ No. C 92, 11.4.1992, p.6
4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years.

4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for seventy years. Member States may lay down that a judicial ruling that a person is declared missing, the validity of which has not expired by the end of a period established under their own legislation, shall constitute a presumption of death for the purposes of this provision.

5. Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.

5. Where a work is published in volumes, parts, instalments, issues or episodes which are not independent and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection of the work shall be calculated from the publication of the last volume, part, instalment, issue or episode. Appendices, year books and other supplements to a work shall be considered to be independent of the latter.

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

6. Where collective works or works created by a legal person have not been lawfully made available to the public pursuant to paragraph 3, they shall be protected for 70 years from their creation.

6a. In the case of posthumous works, and by way of exception to the first paragraph of this article, the period of protection shall be 70 years from the date on which the work was lawfully made available to the public, provided this occurs within 70 years after the death of the author.
1. The rights of performers shall run for fifty years from the first publication of the fixation of the performance or if there has been no publication of the fixation, from the first dissemination of the performance. However, they shall expire fifty years after the performance if there has been no publication or dissemination during that time.

(Amendment No. 9)
Article 2(5) (new)

5. Any person who lawfully makes available to the public a work which is in the public domain, or causes it to be made available, shall have the same rights of exploitation relating thereto as would have fallen to the author. The term of protection of such rights shall be 25 years from the time when the work was first made available to the public.

(Amendment No. 10)
Article 4(3)

3. The terms of protection laid down in Article 2 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the right-holder is a national.

3. The terms of protection laid down in Article 2 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the right-holder is a national and may not exceed the term laid down in Article 2.
The terms laid down in this Directive shall run from the first day of January of the year following the event which gives rise to them.

The terms of protection laid down in this Directive shall run from the event which gives rise to them, as specified for each case referred to in Articles 1 and 2. However, the length of these terms shall be calculated only from the first day of January of the year following the event which gives rise to them.

1. This Directive shall apply to rights which have not expired on or before 31 December 1994. However, this directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

1. This Directive shall apply to works protected by copyright and related rights whose term of protection under the laws of Member States would not have expired on or before 31 December 1993 or which would have been protected on that date if this directive had been in force. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

1a. The provisions of the preceding paragraph shall apply without prejudice to acts of exploitation lawfully carried out before 1 July 1994.

1b. Holders of copyright or related rights shall not be entitled to oppose the continuance of such acts of exploitation as a direct consequence of investment made in good faith before the provisions of this Directive had taken effect. Continuance of the act of exploitation shall include neither the assignment of rights nor other acts of exploitation distinct from the initial act.
1c. The Member States shall provide for the payment to rightholders of adequate remuneration for the acts of exploitation referred to in the preceding paragraph, with effect from the date on which the provisions of this Directive enter into force. The Member States shall ensure that such remuneration is settled where the parties do not reach agreement.

(Amendment No. 13)
Article 8(2)

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

(Amendment No. 14)
Article 10(1), first subparagraph

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 1 July 1994.
DRAFT LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament
on the Commission proposal for a Council directive
harmonizing the term of protection of copyright and certain
related rights

The European Parliament,

- having regard to the Commission proposal to the Council (COM(92) 0033 final –
  SYN 395)¹,

- having been consulted by the Council pursuant to Articles 57(2), 66, 100a and
  113 of the EEC Treaty (C3-0189/92),

- having regard to the report of the Committee on Legal Affairs and Citizens'
  Rights and the opinions of the Committee on Economic and Monetary Affairs and
  Industrial Policy and the Committee on Culture, Youth, Education and the Media
  (A3-0348/92),

- having regard to the Commission position on the amendments adopted by
  Parliament,

1. Approves the Commission proposal subject to Parliament's amendments and in
   accordance with the vote thereon;

2. Calls on the Commission to amend its proposal accordingly, pursuant to
   Article 149(3) of the EEC Treaty;

3. Calls for the conciliation procedure to be opened if the Council should
   intend to depart from the text approved by Parliament;

4. Asks to be consulted again should the Council intend to make substantial
   modifications to the Commission proposal;

5. Calls on the Council to incorporate Parliament's amendments in the common
   position that it adopts in accordance with Article 149(2)(a) of the EEC
   Treaty;

6. Instructs its President to forward this opinion to the Council and
   Commission.

¹ OJ No. C 0092, 11.4.1992, p. 6
1. THE PROPOSAL

The purpose of this proposal for a directive is the harmonization of the term of protection afforded by the Member States of the EC to copyright on literary and artistic works and to certain related rights (interpreting or performing artists, producers of phonograms, producers of audiovisual recordings and broadcasting organizations).

The difference in the period of protection laid down by the different national legislations constitute an obstacle to the completion of the internal market, especially as regards the freedom of movement of goods and provision of services, quite apart from the effect that it has on free competition and freedom of establishment.

As far as copyright is concerned, these differences exist despite the fact that all the Member States are party to the Berne Convention on the protection of literary and artistic works (although in different versions). The convention lays down a period of protection of 50 years, but the Berne Convention countries have the option of recognizing a longer term of protection, and Germany, France and Spain have done so.

With regard to related rights of protection, differences are still greater. Only eight Member States are party to the Rome Convention regulating the protection of related rights, and again, the term of protection laid down here (20 years) may be extended. For that reason we find some countries adhering to the minimum 20 years laid down by the Convention, others which have established a longer term and yet others in which the related rights, or certain categories thereof, have no guaranteed term of protection since they are not recognized as exclusive rights.

The Commission proposes total harmonization of all aspects of protection, dealing not only with the establishment of the term of protection but also the event from which the term of protection is to be calculated in a standard manner for all the Member States. The objective of the Directive is not to harmonize copyright and related rights with regard to content or questions of ownership.

Before describing the content of the proposal, we should point out that there is an undeniable need for harmonization in the last-mentioned field, and all the sectors involved, from authors, to the public, producers and broadcasters have said so. A broad consensus also appears to exist with regard to the term of the provisions proposed by the Commission.

Main points of the Directive

The term established is:

* 70 years for author's copyright,
  - from the death of the author in the case of a natural person.
  - from the date of publication (when the work is lawfully made available to
    the public) in the case of anonymous or pseudonymous works, works created by
    legal persons and collective works.
* 50 years for related rights, from:
  - the publication (in the case of a fixation) or the broadcast (where there is no fixation) or the interpretation or performance of the interpreting artist,
  - the publication of phonograms or audiovisual works,
  - the broadcasting of works by broadcasting organizations.

The Commission has opted for an extensive term of protection for various reasons, including:

- the fact that in order to complete the internal market in this field, it is necessary to establish a long deadline so as to avoid transitional periods;
- general agreement of the sectors affected;
- the average lifespan within the Community is getting longer, and so the term of protection needs to be extended;
- the desire to provide authors with a higher level of protection;
- the desire to keep in line with developments within WIPO.

With regard to the treatment of existing rights, it has been decided that as a general principle, the fixed terms of protection shall apply to all rights which have not expired by 31 December 1994. However, it shall not have the effect of shortening terms of protection which under the laws of the Member States are already running. Such cases are extremely exceptional (it would apply in countries which have introduced extensions in order to offset the effects of war, for example France, or Spain with regard to those rights whose term of protection is 80 years, as laid down by the 1879 Copyright Act).

With regard to third countries, the possibility laid down in Article 7(8) of the Berne Convention has been selected; with regard to copyright, within the Community a term of protection equal to that of the work's or copyright holder's country of origin shall apply, and this term shall not exceed the term granted to works of Community origin. With regard to related rights whose holders are nationals of a third country, the same rule shall apply, provided that the Member State grants protection to the category of related rights in question.

2. AMENDMENTS

For the purpose of considering the amendments tabled by the Committee on Legal Affairs, they may be grouped according to subject:

A. Rights to cinematographic or audiovisual works

Amendment No. 3 to Article 1(2) a (new)

In countries which follow the Anglo-Saxon legal tradition, copyright is not held by the director of a cinematographic work but by the producer: he is the holder of any copyright which exists for the work. This fundamental difference between the system used in 'copyright' countries and the continental tradition is a major obstacle to the Commission's harmonization of copyright.

Parliament came up against this problem when considering the proposal for a directive on rental right and lending right on certain rights related to
The Committee on Legal Affairs has decided to take the same approach with regard to the present proposal for a directive, not only in order to adhere to the EP's stance, but also because he is convinced that no harmonization of the term of protection of cinematographic and audiovisual works can be achieved without harmonizing the rights concerned, because the rights to a work have a direct effect on establishing the point at which the term of protection begins. If this harmonization does not take place, it is possible that in some Member States, e.g. the UK, the 70 years' protection would, following approval of the Directive, fall to the producer of the cinematographic work; and if the producer is a legal person in most cases, the term of protection would be calculated from the date of publication. In France, on the other hand, the term of protection would be 70 years from the death of the last of the natural persons held to be the author. How could Article 4(1) of the proposal apply to situations of this type, assuming as it does that when the term of protection begins to run in one Member State it shall be considered to begin to run throughout the Community?

Recognition of the main director of a cinematographic work as the author thereof is very important but it still remains a minimal degree of harmonization since Member States may lay down that other persons may be considered as joint authors. The need has been demonstrated for more complete harmonization of the rights to cinematographic works since this is the only possible way of achieving the same term of protection in all the Member States. The importance of the sector within the internal market must not be forgotten either.

The Committee on Legal Affairs has adopted the amendment contained in the opinion of the Committee on Culture, which contains a comprehensive harmonization of the rightholders of cinematographic works.

B. Works published in volumes

Amendment No. 5 to Article 1(5)

Article 1(5) lays down the arrangements for works published in volumes, parts, instalments, issues or episodes whose author is a legal person. This problem is tackled in various ways in the legislation of the Member States, with solutions ranging from calculating the term of protection from the date of publication of the final volume to calculating the term of protection for each volume separately from the date of its publication. The Commission proposes the latter solution which, whilst it is laudably simple, does not strike your rapporteur as particularly well-balanced.

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3 COM(91) 276 final - C3-0345/91 - SYN 358
4 Common position of the Council of 18 June 1992, SYN 319 - C3-0287/92
There are positions which place a more nuanced interpretation on one or the other option. The solution contained in Article 22(2) of the French law of 1757 on copyright protects a work in volumes from the date of publication of the final volume, provided publication takes place within 20 years of the issuing of the first volume of the same work. If the time lapse is longer, the term of protection is calculated separately, from the date of publication of each of the volumes.

The solution proposed in the amendment, however, is derived from Article 29 of the 1986 Spanish law on copyright. This system takes greater account of the fundamental unity of the work than of the fact of its being published in volumes. The criterion used is whether the volumes constituting the work are independent or interdependent. In the latter case, the term of protection is to be calculated from the date of publication of the final volume, but in the former case, where volumes published within a series may nonetheless be considered as independent works, they will be protected separately. Specific provisions are also made allowing appendices, yearbooks and other supplements to a work to be considered as independent thereof, thus avoiding the danger that the later publication of such supplements might artificially postpone the beginning of the term of protection of the work.

C. Posthumous works

Amendment No. 7: Article 1(6)a (new)

This amendment deals with the protection of posthumous works, an issue on which the proposal for a directive remains silent. For that very reason, given the simple and rigorous wording of Article 1(1), the only possible interpretation is that the Commission provides protection for posthumous works only if they are published within 70 years of the death of the author and only for the period between that date of publication and the 70th anniversary of the author’s death.

Again, the Commission has opted for the most easily applicable solution. Nevertheless, this solution is the one least likely to encourage the publication of posthumous works either by those holding the copyright or others who possess an original, particularly when the 70-year term of protection has already expired or is about to expire.

Treatment of posthumous works differs from one Member State to another. Highly protective approaches are to be found, e.g. in French law, which recognizes the total term of protection as beginning when the work is published, irrespective of when that event takes place. If publication occurs during the term of protection following the death of the author, those holding the rights enjoy the copyright. If publication takes place after this period has expired, copyright belongs to the owners of the work responsible for publishing it or having it published (Article 23 of Law No. 57-298 of 11 March 1957 on literary and artistic property).

An intermediate solution is to be found in Italian law (Article 31 of the Law of 1941 on copyright) and Spanish law (Article 27 of the Law on Copyright of

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4 In works published for the first time after the death of the author, the term of the exclusive rights to economic benefit shall be 50 years from the date of the first publication, irrespective of the place and form in which this publication has taken place, provided that publication occurs within 20 years.
1987), which offer protection for posthumous works provided that they are published within a specific period following the death of the author.

My amendment is based on this intermediate criterion, and seeks to avoid both penalizing the publication of a work at the end of the term of protection following the death of the author, and the possibility of everlasting protection.

D. Temporal application of the Directive

Amendment No. 12 to Article 6(1)

This amendment is essential to the Directive's objectives, laying down the immediate effect of harmonization of terms of protection.

Article 6(1) of the Commission's proposal lays down that the Directive shall apply to rights which have not expired on 31 December 1984. The Commission's proposed system therefore extends the period of protection only for such works as are protected, as of 31 December 1994, by the legislation of a Member State, and solely in the Member State where such protection is still in force.

This system, which has the advantage of simplicity, also has one major drawback: the effect of harmonization of the term of protection throughout the Member States is postponed in no uncertain terms. This problem will be more serious in those areas where the protection offered by the Member States is at its most uneven, i.e. with regard to cinematographic and audiovisual works, photographs and the protection of performing artists, phonogram producers and broadcasting organizations.

If we take the example of a cinematographic work published in the UK (or Portugal, Ireland, Luxembourg or Italy) in 1939, this work will, in 1994, be in the public domain. Let us suppose that the work is of French origin and that the director (or any of the other natural persons who qualify as author according to the legislation of the seven remaining Member States) died only 30 years ago; in that case the work would still be protected in the other seven Member States (the terms in question varying between 50 and 70 years p.m.a.). When the provisions of the Directive are applied in seven of the Member States, the term of protection would automatically be extended to 70 years p.m.a., whilst in five Member States, the work would remain in the public domain. This example shows us that harmonization would arrive only 40 years after the adoption of the Directive. Similar situations could arise, for example, in the case of phonograms, where differences are even greater, since three Member States (Belgium, Holland and Greece) have not yet recognized the related rights of producers of phonograms.

It is therefore clear that the differences in the terms of protection guaranteed by the Member States and the fact that certain types of rights are not recognized in some Member States will mean that the harmonization sought by the Directive will be neither complete nor effective for many, many years.

1 Copyright on a work published after the death of the author shall last 60 years from the date of publication, provided that this takes place in the 60 years following the author's death.
The consequences for the internal market and the need to regulate copyright within the internal market are highly significant:

- with regard to the freedom of movement of goods (books, phonograms, etc.):

One of the fundamental limitations allowed by the Treaty with regard to the freedom of movement of goods is to be found in Article 36, which allows prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, on grounds of protection of industrial and commercial property. Such protection also includes intellectual property. The case-law of the Court of Justice has significantly defined the substance of copyright as protected by Article 36 and the limits of this protection; the subject of the term of protection of copyright was specifically dealt with by the Court in the ruling on the Patricia case⁶. The Court examined the effects of disparities in terms of protection between different Member States on the free movement of goods. Paragraph 12 of the judgment states: 'In so far as the disparity between national laws may give rise to restrictions on intra-Community trade in sound recordings, such restrictions are justified under Article 36 of the Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights'.

An examination of the Patricia case, and others such as the GEMA⁷ or the Hag⁸ case (where the Court stressed the importance of the consent of the copyright holder in the matter of putting the protected goods into circulation; consent is no longer required when the goods are put into circulation as a result of the end of the term of protection in a Member State), does not answer the question of possible restrictions on the free movement of goods protected by copyright or related rights until such time as the harmonization of the term of protection of these rights is complete. The legal doubt raised by this question and its consequences for the free movement of books or phonograms, for example, is very considerable.

- with regard to the free movement of services, the effects are most significant in the area of cross-border satellite broadcasting.

The Commission proposal for a directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission lays down the principle that broadcasting shall be regulated solely on the basis of the copyright rules which apply in the Member State in which the broadcasting takes place, independently of the legislation of the Member States being broadcast to. If this Directive comes into force without any effective harmonization of the term of protection of copyright and related rights, it may produce serious distortions, for example when a work is broadcast from a Member State in which it is in the public domain to one or more Member States in which that work is

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⁶ EMI Electrola versus Patricia Im-und Export and others, Case 341/87, 24 January 1989: ECR 1142
⁷ Cases 55 and 57/80 Musik-Vertrieb Hasbrom v. GEMA (1981)
⁹ COM(91) 0276 final – C3-0345/91 – SYN 358
still protected. This would negate the protection afforded to the work in question in the Member States receiving the broadcast. This situation will persist as long as the term of protection is not completely harmonized.

In order to avoid the problems which this situation may raise with regard both to the operation of the internal market and to the legal doubt which will persist until terms of protection are effectively harmonized, your rapporteur proposed that the provisions of the Directive be applied immediately. This could be achieved by applying the new proposed term of protection to works protected on the date on which the Directive comes into force, not only in those Member States where these works are still protected, but also in the other Member States where, owing to a shorter term of protection, they are already in the public domain. A consequence would be that a significant number of works currently in the public domain in certain Member States would, from the moment at which the Directive came into force, become copyright again.

Works have been recovered from the public domain on previous occasions, both in the Member States and at Community level.

With regard to the Member States, special mention should be made of the extension of the term of protection guaranteed for works originating in the DDR (from 50 to 70 years) which took place on its unification with the FRG and was applied to works already in the public domain. We could also mention the 1989 'Order in Council' adopted by the UK when the USA joined the Berne Convention; this granted protection within the UK to works previously unprotected.

In the field of Community legislation, there have been previous instances of the application of measures with immediate effect. We would cite two recent instances in the field of intellectual property. First, Article 9(2) of the Directive on the protection of computer programs states:

'The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date'.

Secondly, Article 13(1) and (2) of the Council's common position on the draft directive on rental right, lending right and on certain rights relating to copyright, states:

'1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which are, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or meet the criteria for protection under the provisions of this Directive on that date.

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.'

10 Unification Treaty, Annex 1, Chapter III, E.2

DOC_EN\HR\216\216527.WP5 - 16 - PE 201.082/fin.
As stated earlier, there is a clear need for the provisions of the Directive to be applied immediately and for the solution adopted to be a viable one. The unresolved issue is that of respect for rights acquired before the date on which the Directive's provisions come into force.

The amendment adopted by the Committee on Legal Affairs specifies that at no point will the regulation have a retroactive effect: 'The previous paragraph shall be without prejudice to acts of exploitation legally carried out before 1 July 1994.'

Secondly, a system is established with the aim of ensuring respect for acquired rights. Those responsible for a legal act of exploitation (or investment directly linked to such acts), in good faith and prior to the date of the entry into force of the Directive are guaranteed the opportunity of continuing such acts. An equitable remuneration must, however, be paid to the rightholder for any such continuation. Solutions of this kind, equivalent to a legal licence, have been used on other occasions, e.g. in the case of the German Unification Treaty referred to above.

E. Amendments to the Commission's wording

Some of the amendments adopted agree with the substance of the Commission's proposal, and are simply intended to clarify the terms used or employ technically more correct forms of expression.

Amendment No. 10 to Article 4(3)

This is an amendment of the wording intended to clarify the requirements of the application of the principle of reciprocity in the sphere of related rights.

Amendment No. 11 to Article 5

This is intended to clarify the terms of Article 5 of the proposal for a directive, using the same wording as Article 7(5) of the Berne Convention.

Amendment No. 6 to Article 1(6) and Amendment No. 8 to Article 2(1)

These two amendments are intended merely to improve the wording of the articles. 'Publication' is replaced by a formulation involving the words 'lawfully made available to the public' thus using terminology in keeping with the rest of the Directive and with the terminology used in the Berne Convention on the protection of literary and artistic works.
P. Procedure for notification of plans to grant new related rights

Amendment No. 13 to Article 8(2)

The second paragraph of this article is deleted, because the Committee on Legal Rights accepts the obligation laid down in the first paragraph for Member States to notify the Commission of any plan to grant new related rights, but he does not believe it necessary to go any further in this connection. The system proposed by the Commission in its second paragraph places major restrictions on the legislative responsibility of the Member States in this area, and is of questionable effectiveness. The deletion does not, in any case, stand in the way of new initiatives or other directives which the Commission may wish to propose if technical, technological and even legislative developments in the Member States with regard to this subject justify such measures in the short, medium or long term.

G. Amendment No. 4 to Article 1(4)

Article 1(4) deals with the issue of anonymous or pseudonymous works which are not to be protected 'if it is reasonable to presume that their author has been dead for 70 years'. The amendment adopted is specifically intended to provide a means of establishing this presumption. In the civil law of several Member States, there is a system for declaring a person missing\footnote{See, for example: Articles 112 to 132 of the French 'Code Civil', in particular Article 128, Articles 181-198 of the Spanish 'Código Civil', Articles 48-73 of the Italian 'Codice Civile', and Article 40 et seq. of the Hellenic Civil Code} and such a declaration could usefully be considered as a presumption of death as far as the application of this provision and the conditions it imposes are concerned. Its optional application takes account of the fact that this system for declaring a person missing is not recognized in all Member States.

H. Entry into force of the Directive

Amendment No. 14 to Article 10(1), first subparagraph

The date 31 December 1992 proposed by the Commission has to be changed for obvious reasons. The Committee on Legal Affairs has chosen the date of 1 July 1994.
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy
for the Committee on Legal Affairs and Citizens' Rights
Draftsman: Mr Karsten HOPPENSTEDT

At its meeting of 27 May 1992 the Committee on Economic and Monetary Affairs and
Industrial Policy appointed Mr Hoppenstedt draftsman.

At its meetings of 16-17 June and 28-30 September 1992 it discussed the
Commission proposal. It considered the draft opinion on 29 September 1992 and
adopted the conclusions as a whole by 16 votes to 1.

The following took part in the vote: Beumer, chairman; Hoppenstedt, draftsman,
Cassidy (for Peter Beazley), Cox, Friedrich, Gasoliba i Böhm, Harrison, Herman,
Christopher Jackson, Linkohr (for Hoff), Metten, Read, Ribeiro, Riskær Pederson,
Roumeliotis, Wettig and von Wogau.
I. INTRODUCTION

The purpose of the proposal for a directive is to harmonize the term of protection in the Member States for copyright and certain related rights.

Technological developments in the duplication and transmission of copyright works and performances encourage their dissemination within the Community and internationally. Consequently, copyright and related rights should be harmonized within the Community in respect of the length of protection provided, in such a way as to ensure that the interests of the authors and artists as well as those of the users of copyright works and performances are taken into account.

II. ASSESSMENT OF THE PROPOSAL

As a matter of principle, the proposal’s attempt to standardize the term of protection provided by copyright and related rights throughout the Community and, by agreements with third countries, worldwide, is to be welcomed.

As far as the term of protection is concerned, the Commission comes out in favour of a period of 70 years, covering two generations (in view of the increase in life expectancy). Until now, only one Member State has provided this term of protection.

On page 45 of its proposal, the Commission compares the main terms of protection in the Member States. This survey shows that, under the laws currently in force, the term of protection is 50 years in 10 Member States, 50 or 70 years in the case of works of music in France; only in Germany is the general term of protection set at 70 years.

The list of the terms of protection in some non-Community countries on page 46 of the proposal shows that copyright is normally protected for 50 years.

In its opinion of 1 July 1992 - CES 813/92 - the European Community’s Economic and Social Committee also expressed its support for a copyright protection term of 50 years, stating in its conclusions (3.2):

The Commission’s proposal for a term of protection of 70 years after the death of the author is consistent with the current law of only one Member State. The majority of Member States have no longer than 50 years after the death of the author. Further, a Community agreement on 50 years may be a more useful base to facilitate international agreement on the term of protection. In these circumstances the Council should give serious consideration to adoption of 50 years after the death of the author rather than 70 years.

The draftsman supports this view. The new rules must take account of the interests of authors and of the owners of related rights as well as those of investors and consumers.

As far as authors and copyright holders are concerned, their works must be protected, particularly during their lifetimes. Their labours result in works or performances which culturally enrich their audiences. If an author publishes a work in his or her 40th year and, thanks to increased life expectancy, lives to be 80, a term of protection of 70 years after the author’s death would protect the work for 110 years, or well over a century! This seems inappropriate; copyright protection that lasts for two generations clearly makes the dissemination of our cultural heritage expensive. Authors and performing artists
mainly seek to spread their works amongst their contemporaries, who then pass
them on - if the artists are successful - to the next generation. Experience
indicates that concern for their heirs, particularly the second generation, is
not one of the motives behind their creative activity, which in any event is
not worthy of protection from an economic point of view.

If, during the author's lifetime, the protection if his works is legally and
economically successful, the inheritance is generally a satisfactory one for the
first generation. As far as the second generation is concerned, priority should
be given to the interests of authors and consumers by making the work available
to a broader public at reasonable cost.

Thus, particularly in view of the increase in the life expectancy of authors and
the owners of related rights - Beethoven died at the age of 57, while Marlene
Dietrich lived to over 90 - a term of protection of 50 years seems appropriate.

III. CONCLUSIONS

The Committee on Economic and Monetary Affairs and Industrial Policy asks the
Committee on Legal Affairs and Citizens' Rights, as the committee responsible,
to take the following amendments into account when voting on the report, pursuant
to Rule 120(4) of the Rules of Procedure:

(Amendment No. 1)
Article 1(1)

1. The rights of an author of a
literary or artistic work within the
meaning of Article 2 of the Berne
Convention shall run for the life of
the author and for 70 years after his
death, irrespective of the date when
the work is lawfully made available
to the public.

(Amendment No. 2)
Article 1(3)

3. In the case of anonymous or
pseudonymous works, of works
considered under the legislation of
another Member State to have been
created by a legal person and of
collective works, the term of
protection shall run for 70 years
after the work is lawfully made
available to the public. However,
when the pseudonym adopted by the
author leaves no doubt as to his
identity, or if the author discloses
his identity during the period
referred to in the first sentence,
the term of protection applicable
should be that laid down in paragraph
1.

2nd sentence deleted
(Amendment No. 3)
Article 1(4)

4. Anonymous or pseudonymous works shall not be protected if it is reasonable to presume that their author has been dead for 70 years.

(Amendment No. 4)
Article 1(6)

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 70 years from its creation.

6. In the case of collective works or works created by a legal person, if publication as referred to in paragraph 3 has not taken place, the work shall be protected for 50 years from its creation.

The recitals of the Commission proposal should be amended accordingly.
OPINION

(Rule 120 of the Rules of Procedure)

of the Committee on Culture, Youth, Education and the Media

for the Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr MENDES BOTA

At its meeting of 16 July 1991 the Committee on Culture, Youth, Education and the Media appointed Mr Mendes Bota draftsman.

At its meeting of 15 October 1992 it considered the draft opinion and it adopted the conclusions as a whole.

The following were present for the vote: Banotti, chairman; André (for Mendes Bota, draftsman); Barrera I Casta, Canavarro (for Simeoni), Coimbra Martins, Denys, Dillen, Elliott, Fremion, Galle, Guidolin (for Michelini), Maibaum Oostlander, Pack, Plumb (for Stewart-Clark), Rawlings and Schwartzzenberg (for Rubert De Ventós).
1. **THE SITUATION IN THE COMMUNITY AT PRESENT**

Copyright and related rights are items of intellectual property and, unlike conventional property rights, their terms of protection are limited in time. The term of protection is therefore an essential element in intellectual property rights. There are considerable differences in the terms of protection for some categories of copyright and related rights laid down by the laws of the Member States. These differences could give rise to trade barriers or even distortions of competition in the Community.

Terms of protection are also governed by a number of international conventions:

- the Berne Convention, as revised by the 1971 Paris Act, which provides for a general term of protection of copyright and special terms for certain types of work. The general term of protection of copyright covers the lifetime of the author and 50 years after his death. This is a minimum term. The Convention also provides for a comparison between the term of protection in the country where it is sought and the term of protection in the work's country of origin. It also determines the country of origin of a work, namely the country in which it was first published.

- the Rome Convention, which specifies a minimum term of protection for related rights of twenty years from the end of the year of fixation or performance.

The differences between the terms of protection referred to above are considerable. In some cases they lead to a situation where works or other objects may be protected in some Member States and not in others, the shorter term of protection having already expired.

The case law of the Court of Justice states that 'the problem arising thus stems from the differences between national legislation regarding the period of protection afforded by copyright and by related rights, those differences concerning either the duration of the protection itself or the details thereof, such as the time when the protection period begins to run'. It is clear from this judgment that the differences between terms of protection in the Member States are such that the internal market in literary and artistic works and in cultural goods and services will not be brought about unless those terms are harmonized. The Court even went so far as to state that the harmonization should concern not only the duration of the protection itself but also certain details relating to it, such as the time from which the protection period is calculated.

It follows from the Court's analysis that, if the internal market is to come into being, the Community must find a way of harmonizing the different terms of protection so that all trade barriers have been eliminated by the time the market is established.

Harmonization is justified by the fact that it satisfies the need for legal certainty and eases the management of the rights in question. It will also lead to more effective action against piracy and the importation of illicit products from third countries. A harmonized environment is an essential factor as regards future investment in the sector of creativity in the Community.

Copyright and related rights are of cultural as well as economic significance, and culture cannot be treated as a commodity like any other. The Community cannot afford to remain uninvolved in the area of copyright and related rights,
which are essential to European integration. There is no doubt that copyright and related rights are under threat and that it is incumbent upon the Community to protect them and harmonize protection in an upward direction.

2. THE PROPOSAL FOR A DIRECTIVE

The rapporteur would like to stress that the proposal for a directive presented by the Commission

(a) is consistent with the international conventions referred to above, and the Berne and Rome Conventions in particular;

(b) ensures that rights acquired under national law are maintained;

(c) provides for entitlement to copyright and related rights to continue to be governed by national law;

(d) does not affect the substance of the rights in question;

(e) provides that

- the term of protection in the case of copyright is to be the lifetime of the author and seventy years after his death,
- the term of protection in the case of related rights is to be fifty years from the first publication or fixation.

The rapporteur considers that the directive is the best choice of legal instrument to guarantee as high a level of protection as possible in order to ensure the smooth running of the internal market.

The rapporteur also approves the Commission's choice of legal bases.
3. GENERAL ARGUMENTS IN FAVOUR OF THE COMMISSION PROPOSAL

1. The judgment of the Court of Justice of 24 January 1989 made it evident that the divergences in national law in this area constitute serious obstacles to the free movement of cultural goods, causing marked distortions in the competition rules as between the Member States, in the context of the internal market.

Copyright owners can prevent imports into a Member State where the work in question is still protected of copies which are in circulation in another Member State where the work is no longer protected.

If the term of protection were at least 70 years, respect for the rights acquired in the Member States would mean that the single market would only become reality in the sector 70 years after the entry into force of the present directive.

2. Harmonization should be carried out upwards to universalize the highest existing level of protection, so as to avoid offending existing rights or creating a transition period in which the perverse effects of the present disparity in periods would be accentuated.

3. The 50-year limit was introduced at the Berne Convention in 1908; the evolution in average life expectancy since then would now justify a 70-year pma limit. This would help to improve the economic situation of creators and cultural investors, compensating them for the unequal treatment of literary and artistic copyright vis-à-vis other property rights which are not subject to a time limit.

4. The existing disparities in duration of protection could induce creators to take up residence in Member States where works enjoyed a longer protection period.

5. The 70-year limit pma would also benefit economic operators who are copyright owners (publishers and producers).

6. It would also be crucial for the profitability of certain works such as symphonies or operas which require substantial investment.

7. A 70-year limit pma would have no effect on the prices of cultural products.

While approving the proposal as a whole, the rapporteur would like to make a number of changes to the text.
The Committee on Culture, Youth, Education and the Media calls on the Committee on Legal Affairs and Citizens' Rights to incorporate the following amendments in its report:

**Commission text**

(Amendment No. 1)
Recital 2a (new)

Whereas harmonization must cover not only the terms of protection as such, but also certain implementing arrangements such as the date from which the term of protection is calculated; whereas therefore it is necessary to harmonize the definition of authorship of a cinematographic or televisual work:

(Amendment No. 2)
Article 1(2)(new)

The author(s) of an audiovisual works shall be the natural person(s) responsible for the creation of the work. In the absence of evidence to the contrary, the following shall be presumed to be the authors: the director, script writer, dialogue writer, adaptor and the composer of music with or without words which has been specially written for that work.

(Amendment No. 3)
Article 1(3)

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of the Member State to have been created by a legal person and of collective works, the term of protection shall run for 70 years after the work is lawfully made available to the public.

3. In the case of anonymous or pseudonymous works, of works considered under the legislation of the Member State to have been created by a legal person and of collective works, the term of protection shall run for 70 years after the publication or, failing that, the creation of the work.
(Amendment No. 4)
Article 1(4a) (new)

4a. In the case of posthumous works, the term of protection shall run from the date when the work was made available to the public.

(Amendment No. 5)
(Article 2(4a) (new))

4a. The related rights shall under no circumstances jeopardize authors' copyright, nor shall this article be interpreted in any sense tending to limit the exercise of copyright by its holders.

(Amendment No. 6)
Article 6(1)

1. This Directive shall apply to rights which have not expired on or before 31 December 1993. However, this Directive shall not have the effect of shortening terms of protection which under the laws of Member States are already running.

This Directive shall come into force on 31 December 1993 and apply to all works, performances, phonograms, broadcasts and first fixations of cinematographic works and sequences of moving images even if, by that date, such works or objects have already entered the public domain by virtue of Member States' legislation.

Exploitation of a work or object as specified above which has entered the public domain before this Directive comes into force may continue, if begun before this Directive comes into force, without the consent of the owner or owners of the rights to the work or object.

A fair remuneration shall be paid to the owners of the rights for such exploitation. This Directive shall not have the effect of shortening terms of protection guaranteed under the laws of the Member States.
2. The moral rights granted to the author shall be maintained at least until the expiry of the economic rights.

2. The moral rights granted to the author shall have unlimited duration.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to propose a Directive on the subject.

2. Member States shall defer adoption of the plans referred to in paragraph 1 for three months from the date of notification to the Commission. This period shall be extended to twelve months if, within three months of notification, the Commission informs the Member State that it intends to add to this proposal for a directive.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 December 1992.

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 7 of this Directive by 31 June 1993.